

Christopher Mixson (NV Bar#10685)
 KEMP JONES, LLP
 3800 Howard Hughes Parkway, Suite 1700
 Las Vegas, Nevada 89169
 702-385-6000
c.mixson@kempjones.com

Attorney for Plaintiffs

Roger Flynn, (CO Bar#21078) *Pro Hac Vice*
 Jeffrey C. Parsons (CO Bar#30210), *Pro Hac Vice*
 WESTERN MINING ACTION PROJECT
 P.O. Box 349, 440 Main St., #2
 Lyons, CO 80540
 (303) 823-5738
wmap@igc.org

Attorneys for Great Basin Resource Watch, Basin and Range Watch, and Wildlands Defense

Talasi B. Brooks (Idaho Bar #9712), *Pro Hac Vice*
 Western Watersheds Project
 P.O. Box 2863
 Boise ID 83714
 (208) 336-9077
tbrooks@westernwatersheds.org

Attorney for Western Watersheds Project

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

BARTELL RANCH LLC, et al.,)	Case No.: 3:21-cv-80-MMD-CLB
)	(LEAD CASE)
Plaintiffs,)	
)	CONSERVATION PLAINTIFFS'
)	REPLY TO FEDERAL
ESTER M. MCCULLOUGH, et al.,)	DEFENDANTS' AND LNC'S
)	RESPONSES TO
Defendants,)	MOTION TO ALTER/AMEND
)	BRIEFING SCHEDULE
)	(ECF Nos. 190 & 191)
LITHIUM NEVADA CORPORATION,)	
)	
Intervenor-Defendant.)	

 WESTERN WATERSHEDS PROJECT, et al.,

Plaintiffs,

RENO SPARKS INDIAN COLONY, et al.,

Intervenor-Plaintiff,

BURNS PAIUTE TRIBE,

Intervenor-Plaintiff,

WINNEMUCCA INDIAN COLONY,

Proposed Intervenor-Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, et al.,

Defendants,

LITHIUM NEVADA CORPORATION,

Intervenor-Defendant.

Case No.: 3:21-cv-103-MMD-CLB
(**CONSOLIDATED CASE**)

The controversy here boils down to a question of whether the parties should build time into the litigation schedule for review and possible motions practice regarding the 30,000+ pages of newly-disclosed record documents and seven-page privilege log Federal Defendants (collectively, “BLM”) recently filed (and if so, how much time), or whether the adequacy of those materials to comply with this Court’s order and other law should essentially be accepted without question.

In their oppositions to Conservation Plaintiffs’ (collectively, “WWP”) motion to extend time, BLM and LNC propose that no plaintiff should be afforded an opportunity to challenge the adequacy or completeness of the 30,000+ pages of newly disclosed records, including whether records claimed privileged have been properly withheld. LNC brazenly accuses WWP and Bartell Ranches of advancing “wild theories” regarding BLM’s development of the Environmental Impact Statement at issue here, when all WWP has asked for is a fair opportunity to review, evaluate, and,

1 if necessary, challenge the new record production and potential improper withholding apparent in
2 the privilege log. *See, e.g.*, ECF Nos. 178-4 (Privilege log showing that TPEIS-0304 through
3 TPEIS-0308 consisting of the PDEIS, an internal draft EIS, and cooperating comments on the
4 PDEIS were withheld); 186-1 (2/22/22 Brooks email questioning withholding of TPEIS-0304,
5 0305, 0307, and others). The Court should not endorse this attempt by BLM and LNC to engineer
6 these proceedings to their advantage by denying Plaintiffs and Plaintiff-Intervenors access to the
7 whole record, and denying them adequate time to brief their claims.

8 As this Court has recognized, “[i]f the record is not complete, then the requirement that the
9 agency decision be supported by ‘the record’ becomes almost meaningless.” Order at 5, ECF No.
10 155, quoting *Ksanka Kupaqa Xa’lcin v. U.S. Fish & Wildlife Serv.*, No. CV 19-20-M-DWM, 2020
11 WL 4193110, at *2 (D. Mont. Mar. 9, 2020). Consequently, this Court specifically ordered BLM
12 produce a privilege log so that the Court could tell whether BLM properly withheld documents.
13 *See* Order at 5-6.

14 In its order, the Court recognized the right of the parties to ascertain the correctness of the
15 new record and privilege log: “The privilege log must be sufficiently descriptive such that the
16 Court and the parties are able to determine exactly what Defendants are choosing to withhold.”
17 Order at 6. BLM and LNC ignore this, and instead argue that the parties should not have a full
18 opportunity to review the new record and log. Like before, LNC and BLM ask the Court and the
19 parties to trust BLM’s promises that no further improper withholdings have occurred.

20 Yet, BLM’s own privilege log reflects that it withheld copies of the PDEIS and cooperating
21 agency comments on the PDEIS, which this Court ordered it to include. Or. at 11 (“the Court orders
22 Defendants to supplement the AR with the Preliminary Draft EIS”), *id.* at 14 (ordering Defendants
23 to complete the record with NDOW and NDEP comment letters). For instance, the privilege log
24 indicates that BLM withheld the “Thacker Pass Lithium Mine Project Preliminary Draft
25 Environmental Impact Statement (Cooperating Agency Review Draft).” Privilege Log at TPEIS-
26 0305, ECF No. 178-4. It also reflects that BLM withheld “Cooperating Agency comments on
27 Thacker Pass Preliminary Draft EIS submitted in June 2020” from BLM, the Environmental
28 Protection Agency, NDOW, and the U.S. Fish and Wildlife Service. Privilege Log at TPEIS-0307.

1 While LNC argues that the privilege log's statement that these have been withheld is
2 "demonstrably false," BLM has yet to respond to the concerns WWP raised on February 22, 2022
3 about these privilege log entries. *See* WWP Motion at 3 (ECF No. 188). While it is possible that the
4 inclusion of these documents in the privilege log may be an inadvertent error by BLM, there is no
5 evidence to suggest that is the case, as BLM specifically listed them in the privilege log. If the Court
6 holds that no motions may be filed regarding the new materials or privilege log, there will be no
7 incentive for BLM to respond to WWP's concerns, and no opportunity for the Court to evaluate the
8 materials through in camera review, if necessary.

9 When BLM responds to WWP's concerns, it may contend that it does not need to provide
10 any cooperating agency comments other than the one NDOW comment letter and two NDEP
11 comment letters this Court specifically ordered it to include, even though the Court's rationale would
12 apply equally to comment letters from other cooperating agencies that have been withheld. *See*
13 Order at 11 (finding agency comment letters that were before BLM at the time of the decision and
14 that were germane to environmental concerns were part of the complete record). If BLM takes that
15 position, WWP may need to file an additional motion to complete the Record with these documents.
16 WWP would have moved for the Court to order BLM to complete the Record with all other
17 cooperating agency comments in the first instance, but it did not know they existed until after BLM
18 filed the new record.

19 Further, WWP has not finished thoroughly reviewing the 30,000+ pages of new records yet,
20 but its initial review indicates some additional issues may exist. LNC faults WWP for purportedly
21 not demonstrating reasonable grounds for further motions on the record while brushing off the
22 legitimate concerns WWP has already raised. LNC Resp. at 6. But to identify specific grounds
23 justifying further record motions just to obtain an extension of time to review the record and file its
24 opening brief, as LNC demands it must, WWP would have to already have reviewed the record and
25 identified all the issues potentially warranting a record motion. Because WWP's energies have been
26 diverted by having to file a motion for adequate time to review the new materials before filing its
27 opening brief, WWP has not completed that process. WWP cannot state with certainty that such a
28 motion will be required, but it wants to preserve its right to seek relief from this Court if it cannot

1 amicably resolve any additional issues it may identify with BLM.

2 Moreover, LNC contends that BLM bears no fault for the delay to the proceedings due to
3 problems with the record because all of the records BLM initially withheld were “clearly
4 deliberative.” LNC Resp. Br. at 4, ECF No. 191. Yet, at the same time, LNC contends that
5 reviewing the records imposes no burden on Plaintiffs because some of the records are records
6 WWP and Bartell Ranch provided BLM with their comments. *Id.* at 7. Records provided to BLM
7 with public comments are not deliberative. LNC’s own argument supports that some of the records
8 BLM withheld were deliberative and some were not, further undermining the argument that the
9 new production makes it certain that BLM has now disclosed the full record. Time to review the
10 additional record production and file record motions, if necessary, must be built into the schedule
11 for this case, and WWP has proposed a very reasonable time of 30 days for that process.

12 WWP’s proposal is an equitable compromise, especially given that BLM had 44 days to
13 lodge the supplemental Administrative Record—which was comprised of documents its counsel
14 must have reviewed to determine they were deliberative. Yet, BLM now proposes that Plaintiffs
15 and Plaintiff-Intervenors should have only half that time to review documents, most of which they
16 have never seen before. In addition, the parties agreed to three months for Plaintiffs to review and
17 raise objections to the 50,000-page record BLM originally lodged, and the additional materials add
18 another 30,000 pages to that record. Now, BLM proposes that Plaintiffs must review the 30,000
19 pages in only three weeks.

20 BLM also proposes to shortchange Plaintiffs on the briefing timeline. Whereas Plaintiffs—
21 according to BLM’s proposal—would have less than a month after this Court resolves these
22 motions to prepare their opening summary judgment motions, BLM and LNC would have a full
23 45 days to prepare theirs. *See* BLM Resp. to Mots. To Extend Time at 2 ¶2, ECF No. 190. And,
24 BLM and LNC reserve for themselves hundreds of pages of briefing space to respond to Plaintiffs’
25 opening briefs while allowing Plaintiffs only 40 pages each to respond and reply to those hundreds
26 of pages of briefing. Although WWP previously stipulated to these bloated page limits to avoid
27 the need for getting the Court involved with such minutia, they illustrate how BLM and LNC have
28 endeavored to prevent Plaintiffs from fairly presenting their cases.

1 The Court should not allow BLM and LNC to game the proceedings to their advantage.
 2 While WWP is sensitive to the urgency of getting this matter fully briefed and decided before
 3 LNC wants to bring construction, the matter must be resolved based upon the *whole record*. See
 4 *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). BLM ran a risk of delaying
 5 the proceedings when it decided to withhold 30,000+ pages of purportedly deliberative documents
 6 from the record without a privilege log or other justification. If expediting the proceedings was
 7 truly the objective, the agency should have simply filed the whole record to begin with. If it had
 8 done so, there would be no need for further record motions. But it did not. BLM cannot use that
 9 failed gamble as yet another excuse to prejudice Plaintiffs by denying them a fair opportunity to
 10 ensure the whole record is before the Court and to have reasonable time to fully present their
 11 arguments.

12 In conclusion, WWP respectfully requests that the Court grant WWP's proposal, which is:

- 13 (1) The current deadline for opening summary judgment motions be vacated;¹
- 14 (2) Plaintiffs have until March 18, 2022, or until such later date this Court orders, to review
 15 the new record and file any motion on the record, if needed;
- 16 (3) If such a record motion is filed, the filing of opening summary judgment motions be
 17 stayed until this Court has resolved all motion(s) on the record, the Court and the parties
 18 have reviewed any new documents, and a new briefing schedule is established;
- 19 (4) if no motions on the record are filed by any party:
- 20 i. Plaintiffs' summary judgment motions would be due on April 17, 2022, or such
 21 later date as this Court orders;
- 22 ii. Defendants' summary judgment and response briefs should be due 30 days after
 23 Plaintiffs' summary judgment motions;
- 24 iii. Plaintiffs' response/reply briefs should be due 30 days after Defendants'
- 25
- 26

27 ¹ At a minimum, if this Court denies the Plaintiffs' and Plaintiff-Intervenors' motions to amend the
 28 schedule, WWP requests that the Court set the due date for opening summary judgment motions on
 April 5, 2022. Although BLM proposes April 1, this is due to BLM's initial misunderstanding that
 the three weeks for review that BLM agreed to ran from the date of lodging of the record with the
 Court and not from the date it was received by "all parties." Stipulated Schedule at 2, ECF No. 138.

summary judgment/response briefs;

Respectfully submitted this 4th day of March, 2022.

/s/ Talasi Brooks

Talasi B. Brooks (ISB #9712)
Western Watersheds Project
P.O. Box 2863
Boise ID 83701
(208)336-9077
tbrooks@westernwatersheds.org

Attorney for Plaintiff WWP

/s/ Christopher Mixson

Christopher Mixson (NV Bar#10685)
KEMP JONES, LLP
3800 Howard Hughes Parkway, Suite 1700
Las Vegas, Nevada 89169
702-385-6000
c.mixson@kempjones.com

Attorney for Conservation Group Plaintiffs

/s/ Roger Flynn

Roger Flynn, (Colo. Bar #21078)
Jeffrey C. Parsons, (Colo. Bar #30210)
WESTERN MINING ACTION PROJECT
P.O. Box 349, 440 Main St., #2
Lyons, CO 80540
(303) 823-5738
wmap@igc.org

Attorney for Plaintiffs GBRW, BRW, and WD

Certificate of Service

I, Talasi Brooks, certify that I served the foregoing on this date, by filing it with this Court's ECF filing system, where all parties are represented.

/s/ Talasi Brooks